FILED
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JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 347.

AMERICAN LIFE AND ACCIDENT INSURANCE COMPANY OF KENTUCKY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit.

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SUPPLEMENTAL APPENDIX.

DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

On December 10, 1964, Trial Examiner Owsley Vose issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent and the Charging Party filed exceptions to the Trial Examiner's Decision and supporting briefs.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has considered the Trial Examiner's Decision and the entire record in this case, including the exceptions and briefs, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.[2]

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[1] The Respondent's request for oral argument is hereby denied, as the record, including the exceptions and briefs, adequately presents the issues and positions of the parties.

[2] The Respondent contends that the unit, including debit agents at the Respondent's Cleveland 1 and 2 district offices which serve the entire Cleveland, Ohio, area, found appropriate, is too limited in scope because these offices are not sufficiently autonomous and because the unit excludes the Akron, Ohio, and other offices, in Ohio and other States. In *Metropolitan Life Insurance Company (Woonsocket, R. I.)*, 156 NLRB 1408, the Board reviewed and reaffirmed its decision in *Metropolitan Life Insurance Company*, 138 NLRB 512, where on facts substantially similar to those in the instant case, the Board found appropriate a 6-office unit of debit agents covering the entire Cleveland area and specifically excluded the Akron and other offices. We find those decisions dispositive of the unit issue in the instant case, and therefore find the Respondent's contentions without merit.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondent, American Life and Accident Insurance Company of Kentucky, Cleveland, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated April 21, 1965, Washington, D. C.

FRANK W. MCCULLOCH, *Chairman,*
JOHN H. FANNING, *Member,*
GERALD A. BROWN, *Member,*
National Labor Relations Board.

(Seal)

TRIAL EXAMINER'S DECISION.

STATEMENT OF THE PROCEEDINGS.

THE ANTECEDENT REPRESENTATION CASE.

After the usual proceedings under Section 9 of the Act in which the Respondent was represented by counsel and fully participated, the Regional Director, Eighth Region, National Labor Relations Board, at Cleveland, Ohio, issued a Decision and Direction of Election among the following employees whom he found constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All debit agents employed at or working out of the Employer's Cleveland 1 and Cleveland 2 district offices located in Cleveland, Ohio, excluding office clerical employees, special agents, district managers, assistant district managers, superintendents, assistant

superintendents, and professional employees, guards and all other supervisors as defined in the Act.

Pursuant to Section 102.67(b) and (c) of the Board's Rules and Regulations, Series 8, as amended, the Respondent thereafter filed a Request for Review of the Regional Director's Decision and Direction of Election with the Board in Washington, D. C. by Order dated April 15, 1964, the Board denied the Respondent's Request for Review on the grounds that it raised no substantial issue warranting review.

On April 28, 1964, the Regional Director, following a secret-ballot election conducted under his supervision, certified that a majority of the employees in the unit stated above had designated the Charging Party, hereinafter referred to as the Union, as their representative for the purposes of collective bargaining, and therefore was the exclusive collective bargaining representative of the employees in said bargaining unit.

THE INSTANT UNFAIR LABOR PRACTICE CASE.

Upon a charge filed by the Union on July 10, 1964, the said Regional Director issued a complaint on behalf of the General Counsel of the Board on August 7, 1964. As is more fully set forth in the Trial Examiner's opinion accompanying the Second Order to Show Cause, which is attached hereto as Appendix A, the complaint, after setting forth the usual jurisdictional allegations (paragraphs 1-5, inclusive), alleged: (1) that the employees in the above-stated unit constitute an appropriate collective-bargaining unit within the meaning of Section 9(b) of the Act (paragraph 6); (2) that on or about April 21, 1964, a majority of the employees in the unit described above in the secret-ballot election above referred to designated the Union as

their collective-bargaining representative, and that the Regional Director, on April 28, 1964, in Case No. 8-RC-5456 certified the Union as the exclusive collective-bargaining representative of the employees in the above-stated unit (paragraph 7); (3) that at all times since April 28, 1964, the Union has been the exclusive bargaining representative of all the employees in said unit, as provided in Section 9(a) of the Act (paragraph 8); (4) that commencing on or about May 11, 1964, and continuing to date, the Union has requested, and is requesting, the Respondent to bargain collectively with it as the exclusive representative of the employees in said unit (paragraph 9); and (5) that commencing on or about May 13, 1964, and at all times thereafter, the Respondent refused, and continues to refuse, to recognize or bargain collectively with the Union as exclusive collective-bargaining representative of all the employees in said unit (paragraph 10). Paragraphs 11-14, inclusive, of the complaint contain the usual conclusory allegations that the conduct described above constitutes unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) of the Act.

On August 25, 1964, the Respondent filed an answer to the complaint in which it admitted the jurisdictional allegations of the complaint and that the Union was a labor organization within the meaning of Section 2(5) of the Act. It denied the allegations of paragraphs 6 and 8 of the complaint regarding the appropriate bargaining unit the Union's status as exclusive representative of the employees therein.

With respect to the allegations of paragraph 7 of the complaint, the Respondent admitted that a majority of the employees in the unit alleged to be appropriate had cast their ballots for the Union in the Board-conducted election.

The Respondent answered paragraph 9 of the complaint dealing with the Union's request to it to bargain collectively by stating, among other things, "that said Union did on or about May 11, 1964, request the Respondent to bargain but that there has been no request to bargain since on or about May 11, 1964." Answering paragraph 10 of the complaint which alleged that the Respondent had refused and continues to refuse to recognize and bargain collectively with the Union, the Respondent stated "that it has never refused to bargain with said Union but that it has and does refuse to recognize said Union as the bargaining representative of any of Respondent's employees."

On September 9, 1964, the General Counsel filed a Motion for Judgment on the Pleadings requesting, in view of the admissions contained in the Respondent's answer, that the allegations of the complaint be found to be true and that the Trial Examiner make findings of fact and conclusions of law in conformity with the allegations of the complaint. Thereafter, counsel for the Union joined in General Counsel's Motion for Judgment on the Pleadings.

On September 23, 1964, the undersigned Trial Examiner having in the meantime been designated as the Trial Examiner to hear this case, issued an order directing the Respondent to show cause why the Notice of Hearing in this proceeding should not be vacated and the legal issues resolved by a written decision after the submission of briefs. The order further provided that if the Respondent believed that there were any issues of fact requiring resolution by a formal hearing, the Respondent should set forth in an offer of proof the relevant facts which it proposed to adduce. The Order to Show Cause is attached hereto as Appendix B.

In response to the Order to Show Cause the Respondent filed an amended answer in which it eliminated

the factual admissions regarding the Union's bargaining request and the Respondent's continuing refusal to recognize the Union and simply denied these allegations of the complaint. The text of the pertinent allegations of the complaint and the Respondent's amended answer is set forth at pp. 2-3 of the Trial Examiner's opinion accompanying Second Order to Show Cause which is attached hereto as Appendix A. The Respondent's amended answer did not contain any clarifying allegations of fact whatever.

Deeming the Respondent's amended answer not responsive to his Order to Show Cause and concluding that the Respondent's position required further clarification, the Trial Examiner on October 9, 1964, issued a Second Order to Show Cause and an accompanying opinion. The Second Order to Show Cause directed the Respondent to state whether in fact, as stated in its original answer and contrary to the allegations of the Respondent's amended answer,

(a) The Union, on or about May 11, 1964, did request the Respondent to bargain collectively; and

(b) The Respondent has and does refuse to recognize the Union as the bargaining representative of any of its employees.

The Second Order to Show Cause further directed the Respondent to state what, if any, issues it proposed to tender in this case than those already litigated in the representation proceeding, and to state the general nature of the facts which the Respondent proposed to adduce regarding such issues, and insofar as the Respondent intended to raise issues previously litigated in the representation case, state the general nature of the facts which the Respondent proposed to adduce and the basis for its position that such facts are admissible in evidence in this case.

On October 19, 1964, the Respondent filed an answer to the Trial Examiner's Second Order to Show Cause. In this answer the Respondent affirmed the truthfulness of the admissions in its original answer regarding the Union's May 11, 1964 request to bargain and its continuing refusal to recognize the Union as the bargaining representative of any of its employees. In its answer to the Second Order to Show Cause, the Respondent contended that these admissions were insufficient to establish a violation of Section 8(a)(5) of the Act and that it was necessary to take testimony regarding the refusal to bargain aspect of the violation. The Respondent also made various other contentions in this answer as to the invalidity of the appropriate unit determination herein involved. However, the Respondent did not offer to adduce any evidence other than as to matters already litigated in the representation case, or as to the matters which were properly litigable in the representation case. The Respondent made no proffer of previously unavailable evidence or of any evidence of events subsequent to the hearing in the representation case which might have been relevant in this case.

Upon consideration of the Respondent's answer to the Second Order to Show Cause and the pleadings as a whole the Trial Examiner concluded that most of the matters raised therein had been considered and disposed of by the Board when it denied the Respondent's Request for Review, that the alleged factual issue regarding the refusal to bargain was disposed of by the Respondent's admissions as to the Union's May 11, 1964, collective-bargaining request and as to its continuing refusal to recognize the Union as the bargaining representative of any of its employees, and that any other factual issues which the Respondent sought to raise were not properly litigable in this unfair labor practice case. Accordingly, the Trial Exami-

ner on October 26, 1964, issued an order vacating the Notice of Hearing herein and allowing the parties until November 16, 1964, within which to file briefs. This Order is attached hereto as Appendix C. The time for filing briefs was subsequently extended until Dcember 1, 1964, at the request of the Respondent.

The General Counsel and the Respondent have filed briefs which have been carefully considered.

In the Respondent's brief, it states the issues as follows:

I. Whether the Respondent has in fact refused to bargain with the charging party.

II. Whether the Respondent's combined district offices, Cleveland 1 and 2, constitute an appropriate bargaining unit.

III. Whether the Regional Director's Decision finding that the Respondent's district offices Cleveland 1 and 2 are an appropriate unit is a finding of an appropriate unit based solely upon extent of organization.

IV. Whether the Regional Director's Decision was based on bias and prejudice.

The record in the representation case, particularly the Respondent's Request for Review of the Regional Director's Decision and Direction of Election, shows that issues II, III, and IV were raised by the Respondent in the representation proceeding and decided by the Board when it denied the Respondent's Request for Review on April 15, 1964. As pointed out in the Trial Examiner's opinion accompanying his Second Order to Show Cause (Appendix A, p. 4), such issues may not be relitigated in the subsequent unfair labor practice case. The Trial Examiner is bound by the Board's determination with regard to such matters. On this point see also *Esquire, Inc.*, 109 F. 2d

530, 539, enforced, 222 F. 2d 253 (C. A. 7); *Mountain States Telephone & Telegraph Co.*, 136 NLRB 1612, 1615; *Brown Lumber Co.*, 143 NLRB 174, 175, 177.

With respect to issue I raised by the Respondent—in effect that the admissions contained in the Respondent's pleadings regarding the Union's May 11, 1964, request to bargain and its continuing refusal to recognize the Union as the representative of any of the employees are an insufficient basis for a finding of a refusal to bargain in violation of Section 8(a)(5) of the Act—the Trial Examiner has reconsidered the question but adheres to his previous opinion that such admissions do constitute an adequate basis for a finding of a refusal to bargain in violation of Section 8(a)(5) of the Act.

As indicated in the Trial Examiner's opinion accompanying the Second Order to Show Cause, the duty to bargain collectively embraces first of all the duty to recognize the representative chosen by a majority of the employees in an appropriate bargaining unit as the exclusive representative of all the employees in such a unit. *N. L. R. B. v. Hobbs Co.*, 132 F. 2d 249, 251 (C. A. 1) and cases therein cited; *N. L. R. B. v. Dallas Concrete Co.*, 212 F. 2d 98 (C. A. 5). It is admitted by the Respondent that on April 28, 1964, the Union was certified by the Regional Director as the exclusive bargaining representative of the employees in the Respondent's Cleveland 1 and Cleveland 2 district offices, with certain exceptions, and that on or about May 11, 1964, the Union requested the Respondent to bargain collectively with it. In view of this request the Respondent "was bound to make the next move." *Ritzwoller Co. v. N. L. R. B.*, 114 F. 2d 432, 436 (C. A. 7). Yet, as the Respondent admits, "the Respondent has and does refuse to recognize the Union as the bargaining

representative of any of its employees." Thus the Respondent admits that it continues to refuse to take the first step in fulfilling its collective-bargaining obligation under the Act. These admissions afford an adequate basis for a finding of a refusal to bargain in violation of Section 8(a)(5) and (1) of the Act, and there is therefore no need for the taking of testimony on this issue.

While the Respondent takes a contrary position and asserts in its brief without any supporting argument, that the Trial Examiner's denial of a hearing on this issue denies it due process of law, in the view of the Examiner, as stated in his previous opinion, the Constitution does not require a hearing for the purpose of taking testimony where there are no factual issues to decide. In addition to the cases cited in the Trial Examiner's previous opinion (Appendix A, p. 7), see *Producers Livestock Marketing Assn. v. United States*, 241 F. 2d 192, 196 (C. A. 10), affirmed, 356 U. S. 282, and cases therein cited. In this case the court stated that "it is fundamental to the law that the submission of evidence is not required to characterize 'a full hearing' where such evidence is immaterial to the issue to be decided. * * * Where no genuine or material issue of fact is presented the court or administrative body may pass upon the issues of law after according the parties the right of argument."

Having concluded that the admissions in the Respondent's pleadings establish violations of Section 8(a)(5) and (1) of the Act by the Respondent, and that the Respondent has raised no other issues of fact which are properly triable in this unfair labor practice case, it is appropriate to grant counsel for the General Counsel's Motion for Judgment on the Pleadings, in which counsel for the Union has joined. *KVP Sutherland Paper Co.*, 143 NLRB 834, 836-837; *Metropolitan Life Insurance Co.*, 148 NLRB No. 145;

Equitable Life Insurance Co., 149 NLRB No. 42. Said Motion for Judgment on the Pleadings is hereby granted and, in accordance with the prayer of said Motion, the Trial Examiner hereby makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

1. The Respondent, a Kentucky corporation, having its principal office and place of business at Louisville, Kentucky, is engaged in the sale and issuance of industrial, life, health and accident insurance in several States of the United States, including the States of Kentucky, Ohio and Indiana. In the course of its business, the Respondent receives premiums in excess of $50,000 annually in Ohio, and in excess of $100,000 annually in Kentucky. The Respondent annually makes payment from its Louisville, Kentucky, office to policyholders outside the State of Kentucky in excess of $100,000 and annually pays claims to policyholders in the State of Kentucky in an amount in excess of $100,000.

2. The Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent's district offices located in Cleveland, Ohio, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All debit agents employed at or working out of the Employer's Cleveland 1 and Cleveland 2 district offices located in Cleveland, Ohio, excluding office clerical employees, special agents, district managers, assistant district managers, superintendents, assistant superintendents, and professional employees, guards and all other supervisors as defined in the Act.

4. On or about April 21, 1964, a majority of the employees of the Respondent in the unit stated above, by a secret ballot election conducted under the supervision of the Regional Director, Eighth Region, National Labor Relations Board, in Case No. 8-RC-5456, designated and selected the Union as their representative for the purposes of collective bargaining with the Respondent, and on or about April 28, 1964, said Regional Director certified the Union as the exclusive-bargaining representative of the employees in the said unit.

5. At all times since on or about April 28, 1964, and continuing to date, the Union has been the representative for the purposes of collective bargaining of the employees in the unit stated above, and, by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of all the employees in said unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

6. On or about May 11, 1964, the Union requested the Respondent to bargain collectively with it with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, as the exclusive collective-bargaining representative of all the employees of Respondent in the said unit.

7. Commencing on or about May 11, 1964, and at all times thereafter, Respondent did refuse, and continues to refuse, to recognize the Union as the exclusive collective-bargaining representative of all the employees in the said unit, notwithstanding the fact that the Union was at the time duly designated and certified as the exclusive bargaining representative of the Respondent's employees in said unit.

8. By refusing to recognize the Union as the exclusive collective-bargaining representative of the employees in the said unit on or about May 11, 1964, and thereafter, the Respondent has refused to bargain collectively with the Union in violation of Section 8(a)(5) of the Act and has interfered with, restrained and coerced its employees in violation of Section 8(a)(1) of the Act.

9. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record in the case, the undersigned Trial Examiner, pursuant to Section 10(c) of the Act, issues the following:

RECOMMENDED ORDER.

American Life and Accident Insurance Company of Kentucky, Cleveland, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Insurance Workers International Union, AFL-CIO, as the exclusive bargaining representative of the employees in the following appropriate bargaining unit:

> All debit agents employed at or working out of the Employer's Cleveland 1 and Cleveland 2 district offices located in Cleveland, Ohio, excluding office clerical employees, special agents, district managers, assistant district managers, superintendents, assistant superintendents, and professional employees, guards and all other supervisors as defined in the Act.

(b) Interfering with the efforts of the Insurance Workers International Union, AFL-CIO, to negotiate for

or represent the employees in the said appropriate unit as the exclusive bargaining representative.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with Insurance Workers International Union, AFL-CIO, as the exclusive representative of the employees in the appropriate unit described in paragraph 1(a) above, with respect to rates of pay, wages, hours of work, and other terms and conditions of employment, and embody in a signed agreement any understanding reached.

(b) Post at its Cleveland 1 and Cleveland 2 district offices, copies of the notice attached hereto marked Appendix D.[1] Copies of said notice to be furnished by the Regional Director for the Eighth Region, after being duly signed by an authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof and maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Eighth Region, in writing, within 20 days from the receipt of this

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[1] In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER", shall be substituted for the words "A RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

Recommended Order what steps it has taken to comply herewith.[2]

Dated at Washington, D. C.

OWSLEY VOSE,
Trial Examiner.

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[2] In the event that this Recommended Order be adopted by the Board this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."